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In The

Supreme Court of the United States

LOUIS WEINER, d/b/a LOUIS WEINER REAL ESTATE CO., and ROBERT L. SOLOMON, APPELLANTS,

VS.

STATE REAL ESTATE COMMISSION OF THE STATE OF NEBRASKA, APPELLEE.

On Appeal From the Supreme Court of the State of Nebraska

MOTION TO AFFIRM OR DISMISS AND BRIEF IN SUPPORT OF MOTION

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MOTION TO AFFIRM OR DISMISS

Appellee, State Real Estate Commission of the State of Nebraska, moves the Court to affirm the decision of the Nebraska Supreme Court in this action, or in the Alternative, to dismiss this appeal, for the following reasons:

(1) The appeal does not present a substantial federal question.

(2) The decision of the Nebraska Supreme Court rests on an adequate non-federal basis.

(3) The alleged defects in the administrative hearing before the State Real Estate Commission, if any, were cured by the appeal taken by appellants to the District Court of Douglas County, Nebraska, and to the Nebraska Supreme Court, the matter being tried *de novo* in each of said Courts.

(4) The Nebraska Statutes which set forth the procedures for disciplinary action against licensed real estate brokers and licensed real estate salesmen provide due process of law as required by the Fourteenth Amendment to the Constitution of the United States.

BRIEF IN SUPPORT OF MOTION

STATEMENT OF THE CASE

Louis Weiner, a real estate broker, and Robert L. Solomon, a real estate salesman, have filed an appeal from the decision of the Supreme Court of Nebraska, which affirmed a judgment of the District Court of Douglas County, Nebraska revoking the real estate licenses held by the appellants. The opinion of the Nebraska Supreme Court is reported in 184 Neb. 752, 171 N. W. 2nd 783, and is set out in the Appendix to Appellants' Jurisdictional Statement at pages 1a - 4a.

These proceedings originated with the filing of a complaint against the appellants before the State Real Estate Commission of the State of Nebraska. Written answers to the complaint were filed by each of the appellants. Hearing was had before the Commission on August 28, 1967, following which the Commission made its written findings on September 1, 1967 and entered an order revoking the real estate broker's license of Louis Weiner and the real estate salesman's license of Robert L. Solomon.

A combined text of the complaint and order are set forth in the Appendix to Appellants' Jurisdictional Statement at pages 5a - 11a. However, appellants have ommitted a very pertinent statement contained in paragraphs numbered I of both the complaint and order, which read as follows:

> That the respondent, Louis Weiner, doing business as Louis Weiner Real Estate Co., is the holder of a real estate broker's license duly issued by the State Real Estate Commission and was so licensed at all times mentioned herein; that the respondent, Robert L. Solomon, is the holder of a real estate salesman's license duly issued by the State Real Estate Commission of the State of Nebraska, and was so licensed at all times mentioned herein; *and that the respondent, Robert L. Solomon, was at all times mentioned herein a salesman for and acting on behalf of and in the employment of the respondent, Louis Weiner, doing business as Louis Weiner Real Estate Co.* (Emphasis supplied)

From the order of the Commission the appellants, Louis Weiner and Robert L. Solomon, perfected an appeal to the District Court of Douglas County, Nebraska. Prior to the trial, appellants served notice of their intention to introduce additional evidence before the District Court as provided by Section 81-884.02, Reissue Revised Statutes of Nebraska, 1943, which statute is set forth in the appendix hereto, at page 17. Trial was had *de novo* on the record of the proceedings before the Commission and on the additional testimony and exhibits produced at the trial, which trial before the Court occupied two full days. The record of the evidence presented to the Commission, consisting of 248 pages, was introduced in evidence and 266 pages of additional testimony was presented, together with documentary exhibits, as shown by the record herein.

The District Court entered its decree which made findings of facts and conclusions of law, and affirmed the Order of the Commission revoking the real estate licenses of appellants. The decree of the Court provides in part as follows:

> The Court finds generally that all fifty of the petitioners' allegations of error are without merit and that the Court finds that there is ample evidence in the record to sustain all the findings of the respondent Real Estate Commission and that petitioners violated Sec. 81-881 R.R.S. Nebraska, and by their acts and deeds demonstrated their unworthiness to act as real estate licensees.
>
> The parties appeared at the hearing of the Real Estate Commission concerning the revocation of their license, heard the evidence adduced against them and participated and gave evidence in their own behalf and had the same opportunity and had the same situation in the District Court where the matter was tried de novo under the strict rules which they claim they were denied before the respondent commission.
>
> For the above reasons stated the order of the Real Estate Commission of the State of Nebraska dated August 1, 1967, revoking the broker's license of Louis Weiner and the real estate salesman's license of Robert L. Solomon, was proper and is hereby affirmed by this Court in all respects.
>
> It is therefore ORDERED, ADJUDGED and DECREED that the order of August 1, 1967, by the State Real Estate Commission of the State of Nebraska revoking the broker's license of Louis Weiner and the salesman's license of Robert L. Solomon is hereby revoked by this Court and that all costs of the review in this matter are taxed to the petitioners in error.

Appellants then perfected an appeal to the Supreme Court of Nebraska. Briefs were filed and the matter

orally argued to the Nebraska Supreme Court, but no constitutional questions were raised by appellants in either the printed briefs or in oral argument to the Court. These questions were presented to the Nebraska Supreme Court for the first time in a Motion for rehearing, which Motion the Court overruled.

Louis Weiner and Robert L. Solomon are now before this Court on appeal, seeking a reversal of the decision of the Supreme Court of Nebraska which affirmed the judgment and decree of the District Court.

ARGUMENT

I.

The Appeal Does Not Present A Substantial Federal Question.

The Jurisdictional Statement of Appellants presents questions based upon a claimed denial of due process. The questions raise the following issues:

1. The validity of Section 81-881 (15), Reissue Revised Statute of Nebraska, 1943. (Appendix page 14).

2. The claim that the order of the Commission revoking the licenses of appellants makes findings of facts not alleged in the complaint.

3. Charge of prejudice on the part of one of the members of the Commission.

4. Sufficiency of the evidence to sustain the revocation of the real estate broker's license of Louis Weiner and the real estate salesman's license of Robert L. Solomon.

None of these issues submit a substantial federal question.

II.

The Nebraska Statutes Governing Procedure To Be Followed In Disciplinary Action Against A Licensed Real Estate Broker or A Licensed Real Estate Salesman Provide Due Process.

The Nebraska Statutes relating to procedures to be followed in disciplinary proceedings against real estate licensees are set forth in the Appendix hereto, at pages 13-18. These statutes require a written complaint, a hearing and notice thereof (Sec. 81-882), the right to subpoena witnesses and the right to take and use depositions (Sec. 81-883), the right to use the rules of evidence of the District Court (Sec. 81-883), the right to written findings, determination and order by the Commission (Sec. 81-884), the right to cross-examine witnesses [Sec. 84-914 (4)], the right of appeal (Sec. 81-884.01), and the right to a trial *de novo* and to submit additional evidence before the District Court (Sec. 81-884.02). The record discloses that these statutory requirements were strictly followed and all rights of appellants were fully protected.

Section 81-881 enumerates 20 distinct unfair trade practices as grounds for revocation or suspension of a real estate broker or salesman's license. Subsection (15) provides for such revocation or suspension when "the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman whether of the same or of a different character as hereinbefore specified." The Order entered by the Commission makes detailed findings as to the acts of

appellants which are direct violations of numerous of the stated unfair trade practices. Paragraph XII of the Order then states:

> That the respondents Louis Weiner and Robert L. Solomon, and each of them, by their acts as herein set forth, are guilty of violating Section 81-881, R.R.S. 1943, and have by said acts demonstrated their unworthiness and incompetency to act as broker and salesman respectively.

In *Pastori v. Pennsylvania*, 232 U.S. 138, 34 S.Ct. 28, 58 L. Ed 539 (1914), it is said:

> The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160, 57 L.Ed. 164, 169, 33 S.Ct. Rep. 66; *Rosenthal v. New York*, 226 U.S. 260, 270, 57 L.Ed. 212, 216, 33 S.Ct. Rptr. 27; *L'Hote v. New Orleans*, 77 U.S. 587, 44 L.Ed, 899, 20 S.Ct. Rpt. 788.

III.

Where A State Court Decision Rests On Independent Non-Federal Grounds The Supreme Court Will Decline To Review The Case.

We submit that the Court's decision, which is under attack, was based upon express findings of violations of numerous of the subsections of Section 81-881, exclusive of subsection (15), the only provision which appellants contended violates the due process clause of the Fourteenth Amendment. Therefore, the question presented challenging the validity of subsection (15) is not sufficient to justify a review by this Court, since the non-federal grounds are more than adequate to sustain the decision of the Nebraska Courts.

Numerous decisions hold that where a state court decision rests on independent non-federal grounds, the Supreme Court will decline to review the case. *Jankovich* v. *Indiana Toll Road Commission*, 855 S.Ct. 493, 379 U.S. 487 (1965), held:

> " 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment.' *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158." *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281, 82 S.Ct. 275, 277, 7 L.Ed.2d 285. See also: *Fay v. Noia*, 83 S.Ct. 822, 372 U.S. 391 (1963); and,

Southwest Bell Telephone Co. v. *State of Oklahoma*, 58 S.Ct. 528, 303 U.S. 206, 82 L. Ed. 751 (1938), held that the Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to highest court of the state having jurisdiction, but that its decision of the federal question was necessary to determination of the cause, that federal question was actually decided, or that judgment as rendered could not have been given without deciding it.

IV.

Where An Appeal De Novo To The Courts Is Had From An Administrative Decision, Due Process Defects In The Administrative Hearing Are Cured.

Ample authority exists for the proposition that due process defects in administrative hearings may be satisfied by appeal *de novo*. A leading case is *Hagar* v. *Reclamation District No. 108*, 111 U.S. 701, 45 S.Ct.

663, 28 L. Ed. 569 (1884), where in an appeal from a tax assessment made on bond, the Court held that where the law provides a method whereby appeal as is appropriate to the nature of the case may be had, " 'The judgment in such proceedings cannot be said to deprive the owner of his property without due process of law. . .' (96 U.S. 97)". The Court further held that the necessity of notice and of opportunity to be heard are satisfied where a hearing in court is allowed.

Bailey v. *Anderson,* 326 U.S. 203, 90 L. Ed. 3, 66 S.Ct. 66 (1945), appears to be a controlling case; the case involved condemnation proceedings brought by the State Highway Commissioner of Virginia. The Court held:

> Here the appellant was given full opportunity to be heard and to introduce evidence before the Commissioners. They could, upon the evidence submitted, take into account the alterations of the property after the taking and before the view; such was their duty under the statute. Their award is made subject to judicial review by § 1969 j (2), and upon such review may be set aside if plainly wrong or without support in the evidence. *Barnes v. Tidewater, R.Co.*, 107 Va. 263, 266-68, 58 S.E. 594; *Duncan v. State Highway Commission*, 142 Va. 135, 146-148, 128 S.E. 546. In this *we find no denial of due process, and appellant's contention presents no substantial constitutional question,* as the authorities cited show. (Emphasis added).

De novo review was held to cure an omission of a hearing in fixing liability for support of relatives in a proceeding by the State Public Welfare Commission. *Mallat* v. *Luihm,* 206 Ore. 678, 294 P. 2d 871 (1956) held that:

> While notice and an opportunity to be heard are

> of the essence of due process, it is not required that a hearing shall be given at any particular stage of the proceedings. It is sufficient if, before liability becomes final, the person whose rights are affected is given his 'day in court'. *Stellar v. O'Hara*, 69 Ore. 519, 540, 139 P. 743, L.R.A. 1917 C., 955, Ann. Cas. 1916 A, 217; *Towns v. Klamath County*, 33 Ore. 225, 233, 234, 53 P. 604.

Provisions for a judicial review of administrative orders constituted due process of law in *National Candy Co.* v. *Federal Trade Commission*, 104 F. 2d 999 (1939); and in *Bourjois, Inc.* v. *Chapman, et al.*, 301 U.S. 183, 57 S.Ct. 691, 81 L.Ed. 1027 (1937).

This principle has been applied in other areas of administrative procedure. In *Lichter* v. *United States*, 334 U.S. 742, 791-792, 68 S.Ct. 1294, 1319, 92 L. Ed. 1694 (1948), it was held that the procedure before renegotiation officials could not deny due process, since the statute provided for *de novo* review before the United States Tax Court. See also: *Ewing* v. *Mytinger and Casselberry*, 339 U.S. 594, 70 S.Ct. 870, 94 L. Ed. 1088 (1950), which held that an opportunity for a hearing and a judicial determination being provided, due process requirements are satisfied in an action by the Food and Drug Administrator in seizing property.

The claim of prejudice on the part of one of the members of the Commission, even if true, is answered in the case of *Ours Properties* v. *Ley*, 198 Va. 848, 96 S.E. 2d 754 (1957), which held:

> Should an official act arbitrarily or dishonestly where protection is afforded by appeal and by review in the courts, as in this case, the requirements of procedural due process are satisfied.

Appellants further claim a denial of due process on

the grounds that certain of the acts of which they were found guilty were not alleged in the complaint. These findings, however, related to the transaction wherein appellants were charged with violation of their duties as real estate licensees and naturally the evidence in a hearing of this nature will reveal facts not known at the time to the drafters of the complaint. Setting forth every detail of their actions in the complaint was certainly not required in order to satisfy the due process requirements.

Regardless of this claim, any such defect was cured by the trial *de novo* before the Court. The appeal was a challenge to the findings and order of the Commission, which in effect became the complaint at the trial. Every finding contained in the order was then known to appellants and the additional evidence introduced by appellants during the two day trial was directed to such findings. Can they now claim a denial of due process because of a lack of notice and the right to present evidence to refute these charges? The Courts have held to the contrary.

Appellants' claim that the findings made against the appellants are "totally devoid of evidentiary support" (Jurisdictional Statement, page 6) is entirely unfounded. Both the District Court of Douglas County, Nebraska and the Supreme Court of Nebraska considered this case *de novo* and found ample evidence to sustain the findings. The opinion of the Nebraska Supreme Court concludes:

> . . . Definitely, their dealings in this transaction clearly violate the provisions of Section 81-881, R.R.S. 1943, and their licenses should have been and were properly revoked.

CONCLUSION

No substantial federal question is involved in this appeal and the decision of the Supreme Court of Nebraska should be affirmed, or in the alternative, the appeal should be dismissed.

Respectfully Submitted,

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APPENDIX

81-881. Real Estate Commission; unfair practices, defined. The commission may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any real estate broker or any real estate salesman and shall have the power to revoke or suspend any license, issued under sections 81-862 to 81-887, whenever the broker or salesman has been found guilty of any of the following unfair trade practices: (1) Refusing, because of race, color, national origin or ethnic group, to show, sell, rent, or lease any real estate for sale or rent to prospective purchasers, renters, or lessors; (2) intentionally advertising, whether printed or by radio, display or other nature, which is misleading or inaccurate in any material particular or in any way misrepresents any property, terms, values, policies or services of the business conducted; (3) failing to account for and remit any money coming into his possession belonging to others; (4) accepting, giving or charging any undisclosed commission, rebate or direct profit on expenditures made for a principal; (5) acting in a dual capacity of broker and undisclosed principal in any transaction; (6) guaranteeing or authorizing or permitting any person to guarantee future profits which may result from the resale of real property; (7) placing a sign on any property, offering it for sale or rent, without the written consent of the owner or his authorized agent; (8) offering real property for sale or lease without the knowledge and consent of the owner or his authorized agent or on any terms other than those authorized by the owner or his authorized agent; (9) inducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal; (10)

accepting employment or compensation for appraising real property contingent upon the reporting of a predetermined value or issuing an appraisal report on real property in which he has an undisclosed interest, unless such interest is disclosed in the report; (11) negotiating a sale, exchange or lease of real property directly with an owner or lessor if he knows that such owner has a written outstanding contract, in connection with such property, granting an exclusive agency or an exclusive right to sell to another broker; (12) soliciting, selling or offering for sale real property by offering free lots or conducting lotteries for the purpose of influencing a purchaser or prospective purchaser of real property; (13) representing or attempting to represent a real estate broker, other than the employer, without the express knowledge or consent of the employer; (14) paying a commission or compensation to any person for performing the services of a real estate broker or real estate salesman who has not first secured his license under sections 81-862 to 81-887 or is a nonresident who is licensed in his state of residence; (15) the broker or salesman has demonstrated his unworthiness or incompetency to act as a broker or salesman, whether of the same or of a different character as hereinbefore specified; (16) commingling the money or other property of his principals with his own or failure to maintain and deposit in a separate account all money received by a real estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; (17) failure to include a fixed date of expiration in any written listing agreement and failure to leave a copy of such agreement with the principal; (18) failure to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real

estate to the buyer and to the seller; (19) failure by a broker to deliver to the seller in every real estate transaction wherein he acts as a real estate broker, at the time such transaction is consummated, a complete, detailed closing statement, showing all of the receipts and disbursements handled by such broker for the seller; also failure to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what that same were disbursed; the broker shall retain true copies of such statements in his files; or (20) the broker or salesman shall have been convicted of a felony.

81-882. Hearings; notice; how given. (1) Before the commission shall deny any application for a license or before revoking or suspending such license, it shall give the applicant or holder of the license, as the case may be, a hearing on the matter and shall, at least twenty days prior to the date set for the hearing, notify the applicant or license holder in writing. Such notice shall contain an exact statement of the charges against him and the date and place of hearing. (2) The applicant or license holder, as the case may be, shall have full authority to be heard in person or by counsel before the commission in reference to such charges referred to in subsection (1) of this section. Such notice may be served by delivering it personally to the applicant or license holder or by sending it by either registered or certified mail to the last-known business address of such applicant or license holder. If the applicant or license holder is a salesman, the commission shall also notify the broker employing him or in whose employ he seeks to enter by mailing such a notice to the broker's last-known business address.

81-883. Hearings; subpoena; witness fees. In the preparation and conducting of such hearing, the director shall have power to issue and sign subpoenas to require the attendance and testimony of any witness and the production of any papers or books. He may administer oaths, examine the witnesses and take any evidence he deems pertinent to the determination of the charges. Any witness so subpoenaed shall be entitled to the same fees and mileage as is prescribed by law in judicial proceedings in the district courts of this state in civil actions, but the payment of such fees and mileage must be paid out of and kept within the limits of the funds created from such license fees. The party, against whom such charges may be filed, shall have the right to obtain from the director a subpoena for any witnesses which he may desire at such hearing. Depositions may also be taken and used as in civil court cases in the district courts.

81-884. Hearings; findings; order; license; revoked or suspended. After such hearing the State Real Estate Commission shall state in writing, officially signed by all the members concurring therein, its findings and determination and its order in the matter. If the commission shall determine and order that any applicant is not qualified to receive a license, no license shall be granted, and if the commission shall determine that the license holder has been guilty of any violation of the provisions of sections 81-862 to 81-887, his license shall be revoked or suspended forthwith.

81-884.01. Order; appeal; bond; parties; petition; service; answer. Within ten days after an order of the State Real Estate Commission has become final, the applicant for a license or a license holder may obtain judicial review thereof by serving upon the director,

a written notice of such appeal and a demand in writing for a certified transcript for all the papers on file in his office affecting or relating to such order, together with a transcript of the evidence, and the payment of the fee therefor, and he shall, within thirty days from the entry of such order, file a petition for review in the district court for the county where the cause of action or some part thereof arose, together with a bond to the State of Nebraska in the sum of two hundred dollars, with sufficient surety to be approved by the clerk of the district court to which such appeal is taken and shall be conditioned that the applicant for a license or license holder shall pay all costs taxed against him which may accrue to the commission by reason of taking such appeal. In lieu of such bond, a cash deposit of two hundred dollars may be made with the clerk for the same purpose. The petition for review need not be verified but shall state the grounds upon which such review is sought. The commission shall be deemed to be a party to any such review proceedings. The petition for review shall be served upon the director by leaving with him a copy of the petition and the commission shall file its answer within ten days from the date of service of the petition for review.

81-884.02. Appeal; hearing; trial de novo; additional evidence; notice; rebuttal. *In any judicial proceeding under sections 81-884.01 and 81-884.02 the court shall consider the matter de novo upon the record.* The court may on its own motion order additional evidence to be taken before it. *In addition, any party to such review may offer additional evidence before the court; Provided,* that such party shall have served written notice of such offer on the other parties at least ten days prior to the hearing thereof. Such notice

shall set out the nature of the evidence which he so desires to offer and the names of the witnesses whom he intends to call. In such event the other parties may without advance notice offer evidence in rebuttal. Such proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of the state. (Emphasis Supplied)

Section 84-914.

(1) An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence; *Provided, that any party to a formal hearing before such agency, from which a decision may be appealed to the courts of this state, may request that such agency be bound by the rules of evidence applicable in district court by delivering to such agency at least three days prior to the holding of such hearing a written request therefor,* such request to include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof including the cost of court reporting services which the requesting party shall procure for the hearing. All costs of a formal hearing shall be paid by the party or parties against whom a final decision is rendered.

. . . (4) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence. (Emphasis Supplied).

CERTIFICATE OF SERVICE

I, Robert A. Nelson, a member of the bar of this court, hereby certify that I served the above and foregoing Motion To Affirm or Dismiss and Brief In Support Of Motion on the appellants by mailing two copies thereof to Harry H. Foulks, 608 Executive Building, Omaha, Nebraska 68102, their attorney of record by forwarding the same by United States mail, postage prepaid, on June 18, 1970.

Robert A. Nelson